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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ABRAHAM ALBERT HERNANDEZ,

Defendant and Appellant.

G039260

(Super. Ct. No. 02CF2160)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert R. Fitzgerald, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed as modified.

Mark Alan Hart, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, David Delgado-Rucci and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

Abraham Albert Hernandez appeals from a judgment after a trial court convicted him of special circumstance first degree murder, second degree murder, and street terrorism. The court found true allegations Hernandez committed multiple murders and he personally used a firearm. On appeal, Hernandez maintains: (1) the evidence was insufficient to support his second degree murder conviction because the evidence failed to establish his identity as the perpetrator and failed to prove he specifically intended the murder to benefit a gang; (2) imposition of the consecutive terms of 25 years to life pursuant to Penal Code¹ section 12022.53, subdivision (d), should not apply to him; (3) the abstract of judgment should be corrected to reflect the applicable sentence for the first degree murder conviction; and (4) he is entitled to five days of additional custody credits.

The Attorney General agrees the abstract of judgment should be corrected regarding the sentence as to count 2, but refutes the other contentions. Hernandez, in his reply brief, notes the trial court corrected his custody credits rendering the issue moot. However, Hernandez requests the superior court be ordered to certify and send copies of the amended abstract of judgment to the appropriate parties. We conclude the abstract must be corrected again with respect to the sentence on count 2. The superior court is directed to modify the sentence on count 2 and forward the newly amended abstract of judgment to the Department of Corrections and Rehabilitation, Division of Adult Operations. Hernandez's other contentions lack merit, and consequently, we affirm the judgment in all other respects.

FACTS

Murder of Andres Cisneros

Late one summer evening, Guillerma Gomez was sitting outside her home when she saw her neighbor, 55-year-old Andres Cisneros, walk by. At the same time,

¹ All further statutory references are to the Penal code.

she saw two Hispanic males in a blue car drive by and yell at Cisneros in Spanish. The car stopped near Cisneros, and Gomez heard the men inside the car say in a “very bad[]” tone, ““Hey, old man you better fucking watch it[.]”” Cisneros looked back, but said nothing. As the men drove away, they continued to yell at Cisneros.

Approximately one-half hour later, it was nearly midnight and Cisneros was getting something from his car when the same two Hispanic men drove by again. Gomez heard the men yell at Cisneros, ““Fucking puto[]”” and, ““You better watch out old man[.]”” Cisneros did not respond or look at the men. The car drove away.

At around 1:00 a.m., the next morning, George Alvarado was driving his car when he saw two men “arguing or fighting.” After Alvarado drove past the men, he heard a gunshot. He looked in his rear view mirror and saw Cisneros fall onto the sidewalk. He then saw the shooter look in Cisneros’s “stuff” and pick something up off the ground. Alvarado made a U-turn and noticed a white Nissan on the east side of the street heading north. The shooter got into the car, and the driver made a U-turn and headed south. Alvarado saw two male Hispanics in the car as he drove past them before making another U-turn to try to get the car’s license plate number. Unsuccessful, he returned to the area where Cisneros lay dying and Alvarado called 911 from a nearby store. Other than the clothing of the passenger, Alvarado could not describe either culprit. Alvarado described the shooter as being a male Hispanic, 18 to 20 years old, five feet six inches tall, wearing a black beanie cap, black and gray checkered shirt and black gang-type pants. He did not see the shooter’s face. Cisneros died from a gunshot wound to the abdomen.

Murder of Cesar Tejada

That same morning, around the same time, there was another murder by gunshot approximately one and one-half miles away from where Cisneros was shot. Cesar Tejada, Raul Ramirez, Lupe Olivares, and Griselda Alfaro, were standing in front of an apartment socializing. Two men, one dressed in sweatshirt with a hood over his

head (later identified as Freddy Curiel), and the other wearing a checkered shirt (later identified as Hernandez), angrily stared at them as they walked past going towards a 7-Eleven store. Ramirez recalled the two men looked at Tejeda in particular.

After the men passed by, Ramirez went inside an apartment momentarily. When he returned outside, he saw Tejeda, Alfaro, and Olivares arguing with Hernandez and Curiel. Hernandez asked Tejeda where was he from. Tejeda stated he was not from anywhere. Ramirez approached the group, and in Spanish, told the two men to leave because they did not live in the area. Curiel replied, "Shut the fuck up." Ramirez stopped talking. Hernandez told Ramirez their problem was with Tejeda and then he pulled a gun from his waistband and pointed it at everyone. At close range, Hernandez shot Tejeda, who was simply standing by a gate with no place to go. The men fled, and Ramirez went inside and called 911. Tejeda died from a gunshot wound to the chest.

The Aftermath

Still photographs obtained from a surveillance videotape at the 7-Eleven store showed Hernandez, in a checkered shirt, and Curiel enter the store at 1:12 a.m., and leave about 1:15 a.m. Hernandez, when later interviewed by the police, acknowledged the photograph showed him in a checkered shirt purchasing apple juice.

Santa Ana Police Officer David Rondou interviewed Olivares at the police station approximately four hours after the shooting; she did not appear to be drunk or high. Olivares stated she was hanging around with her friends when two men came toward the group and "mad dogg[ed]" them. She recognized Curiel, having seen him several times in the neighborhood. She recalled previously hearing him say out loud the neighborhood was "OTH" (which stands for the gang "On The Habit" or "Only The Hoodlums"). Olivares said the two men were aggressive towards her friends. Olivares did not know Hernandez, but identified him from a 7-Eleven store security videotape. She said Hernandez shot Tejeda.

Four days later, Officer Michael Kuplast executed a search warrant on a residence Olivares had indicated was used by the OTH gang. Kuplast discovered several types of ammunition (including .38 caliber ammunition), numerous items with OTH gang graffiti written on them, a blue and green long sleeved “checked” shirt that matched the description of the shirt Hernandez was wearing, a black beanie, a gun case, and drug paraphernalia. The items with OTH gang graffiti included the names Kid, Champ (Curiel’s moniker), and Clumsy (Hernandez’s moniker).

Neither of the victims had any documented gang affiliation. It was determined the bullets recovered from each body were fired from the same .38 caliber firearm. When Hernandez was interviewed by police, he said he did not remember the events relating to the shooting. He acknowledged he went to the 7-Eleven store, there was a confrontation, he heard a “pop” and he ran. He had smoked weed and gotten high that night.

Procedural History and Trial

An information charged Hernandez with the murder of Cisneros (count 1), the murder of Tejada (count 2), and street terrorism (count 3). As to counts 1 and 2, the information alleged Hernandez personally discharged a firearm causing death within the meaning of sections 12022.53, subdivision (d), 1192.7, subdivision (c)(1), and 667.5. The information also alleged two special circumstances: (1) Hernandez committed multiple murders; and (2) Tejada’s murder was committed while Hernandez was an active participant the OTH criminal street gang and the murder was carried out to benefit that gang. It was alleged both murders were for the benefit of a criminal street gang. Finally, both counts of murder were alleged as serious felonies. Hernandez pled not guilty and waived trial by jury.

Officer Steven Lodge was called as the People’s gang expert. Lodge had reviewed the videotape from the 7-Eleven store and the still photographs taken from the videotape. Lodge concluded that based on his research and experience, both Curiel and

Hernandez were active members of the OTH gang. Lodge also reviewed letters sent back and forth between Hernandez and Curiel while they were in custody. Based on all the circumstances of the case, Lodge opined both murders were gang related and committed for the benefit of the gang.

The court found Hernandez guilty of special circumstance first degree murder, second degree murder, and street terrorism. The court also found true each special circumstance and the enhancement allegation. He was sentenced to state prison for a term of 15 years to life on count 1. As to this count, the court struck the multiple murder circumstance, but imposed the firearm enhancement of a consecutive term of 25 years to life. For count 2, the court imposed a consecutive term of 25 years to life, enhanced by terms of life without the possibility of parole for each special circumstance. Count 2 was also enhanced by a consecutive term of 25 years to life for the firearm use allegation. This sentence is reflected in the abstract of judgment, however on the record, the court stated the two life terms merged and, therefore, the total term for count 2 was life without parole plus 25 years to life. The court stayed the sentence for count 3. Accordingly, Hernandez's total sentence was life without parole, plus 65 years to life in state prison.

DISCUSSION

A. Sufficiency of the Evidence

Hernandez contends the evidence is insufficient to support his conviction of second degree murder of Cisneros (count 1). He maintains the record lacks sufficient credible evidence identifying him as one of the perpetrators. He asserts count 1 should be reversed along with the multiple murder special circumstance. Alternatively, he argues there is insufficient evidence count 1 was committed to benefit a criminal street gang and the finding pursuant to section 186.22, subdivision (b)(1), should be reversed. We conclude the evidence, albeit entirely circumstantial, was sufficient to support the verdict and the finding.

In assessing a claim of insufficient evidence, “[t]he test on appeal is whether substantial evidence supports the conclusion of the trier of fact,” not whether the reviewing court believes the evidence established guilt beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) “We view the evidence in the entire record in the light most favorable to the respondent and we presume the existence of every fact in support of the judgment that the trier could reasonably deduce from the evidence. [Citation.] To be substantial, the evidence must be “of ponderable legal significance . . . reasonable in nature, credible, and of solid value.” [Citation.]” (*In re Jose P.* (2003) 106 Cal.App.4th 458, 466; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.)

The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. (*People v. Bean* (1988) 46 Cal.3d 919, 932 (*Bean*).) “Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt. “If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.” [Citations.]” (*Bean, supra*, 46 Cal.3d at pp. 932-933.)

Hernandez’s sufficiency of the evidence argument relates to whether the evidence failed to establish his identity as the shooter causing Cisneros’s death. Although Alvarado did not see the face of the perpetrator of Cisneros’s murder, he described Hernandez’s nationality, clothing, and his approximate age and height. A second murder occurred close in time and less than two miles away, where witnesses positively identified Hernandez as the shooter. Hernandez admitted he wore a plaid-type shirt and was photographed in the 7-Eleven store shortly before he shot Tejeda. Both incidents involved two male gang members being aggressive with the victim before the

victim was shot at close range. The same gun was used at both locations. We conclude a reasonable judge could conclude the circumstantial evidence of the two shooters, wearing the same type of clothing, using the same gun, being the same height, the same nationality, and picking fights in the same gang territory, within a relatively short period of time and within close proximity, all point to the conclusion Hernandez committed both crimes.

Hernandez finds fault with some pieces of the evidence. He theorizes his plaid-type shirt was not a unique item of clothing and could have been worn by other gang members, a car was used in the first, but not the second homicide, and gangs often have guns that pass quickly between members. But as discussed above, there was other more persuasive circumstantial evidence. Given our standard of review, and viewing all the evidence in the light most favorable to the judgment, we conclude the totality of the circumstances in the case substantially supported the second degree murder conviction.

Hernandez also challenges the evidence supporting the gang enhancement. Specifically, he argues the evidence failed to show he shot Cisneros with “the specific intent to promote, further, or assist the gang or any member” within the meaning of section 186.22, subdivision (b)(1). He asserts, “Assuming the evidence is sufficient to establish that OTH is a criminal street gang and [Hernandez] was an active member, the evidence does not establish that the homicide . . . was committed with the specific intent to promote, further or assist the gang Unlike count 2 where there is evidence the perpetrators tried to ascertain if the victim was a member of a rival gang, nothing in the evidence suggests a gang connection relating to count 1.” The victim was called an old man, and was not accused of being a rival gang member. Hernandez recognizes the gang expert opined Cisneros’s death would establish respect in the neighborhood and within the gang. However, Hernandez claims this opinion is speculative because the expert did not have any evidence the murder was discussed between gang members. Moreover, there was no evidence Hernandez harbored the specific intent to shoot Cisneros to

achieve additional respect for the gang. We disagree, concluding there was sufficient evidence, again entirely circumstantial, to support the gang enhancement finding.

To establish a violation of section 186.22, subdivision (b)(1), the People must establish (1) defendant's crime was "committed for the benefit of, at the direction of, or in association with any criminal street gang," and (2) defendant had "the specific intent to promote, further, or assist in any criminal conduct by gang members[.]" (Accord, *People v. Villalobos* (2006) 145 Cal.App.4th 310, 322 (*Villalobos*).) With respect to the first element, specific intent to benefit the gang is not required. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1197 (*Morales*).) Hernandez does not dispute this element was satisfied, but rather focuses on the second element.

However, as to the enhancement's second prong, "all that is required is a specific intent 'to promote, further, or assist in any criminal conduct by gang members.'" (§ 186.22, subd. (b)(1).) Commission of a crime in concert with known gang members is substantial evidence which supports the inference the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime. [Citation.]" (*Villalobos, supra*, 145 Cal.App.4th at p. 322; citing *Morales, supra*, 112 Cal.App.4th at p. 1198.)

In this case, there was evidence Hernandez and Curiel were known active members of the OTH criminal street gang on the night of the murders. Hernandez does not dispute his status as a gang member on appeal. Hernandez admitted to police he had seen Curiel by the 7-Eleven store, and they had spoken "once or twice[.]" Hernandez and Curiel corresponded by writing letters while they were in custody, wherein Curiel referred to Hernandez with a great degree of familiarity: He wrote, "'You're my homeboy,'" and "'with respect to you[.]'" Their gang monikers were found written on various items in a house associated with OTH members. The gang expert testified, based on his training and experience, gang members will not commit a crime with someone who is not a trusted member of the same gang, especially for more violent crimes.

Moreover, he opined a gang member shows his dedication to the gang by committing a very violent act on behalf of a gang. He also stated Cisneros's murder would serve to establish respect in the neighborhood for the OTH gang.

We found no evidence indicating the name-calling, threats, argument, and eventual murder of Cisneros was merely "a frolic and detour unrelated to the gang." (*Morales, supra*, 112 Cal.App.4th at p. 1198.) Rather, the evidence suggests Hernandez, and his fellow gang member, Curiel, set out to terrify and intimidate the neighborhood with a crime spree and a loaded gun.

B. Sentencing

On count 1 the trial court sentenced Hernandez to 15 years to life, and on count 2, it sentenced him to a consecutive term of 25 years to life. The court then enhanced these sentences by adding an indeterminate term of 25 years to life to both counts pursuant to section 12022.53, subdivision (d), for the use of a firearm during the commission of the offense. Hernandez argues the additional consecutive terms of 25 year to life added to each murder count pursuant to section 12022.53, subdivision (d), should not apply to him under principles of double jeopardy. He argues he is being punished twice for the one act of causing a death. He maintains this enhancement should be treated as the equivalent of a lesser included offense to murder.

Section 12022.53, subdivision (a), specifies a list of felonies to which enhanced punishment applies for use of a firearm. Murder is first on the list. (§ 12022.53, subd. (a)(1).) Subdivision (d) of section 12022.53 provides for an additional term of 25 years to life for intentionally and personally discharging a firearm during the commission of a felony listed in subdivision (a) and proximately causing great bodily injury. This subdivision also plainly states the enhancement must be applied "[n]otwithstanding any other provision of law" and as an "additional and consecutive term of imprisonment" Nevertheless, Hernandez argues that because the killing was

an element of the murder conviction, the enhancement constitutes multiple punishment for the finding that he proximately caused a death.

Hernandez concedes this same argument had been repeatedly rejected by other courts (*People v. Sloan* (2007) 42 Cal.4th 110, 115-125; *People v. Izaaguirre* (2007) 42 Cal.4th 126, 130-135; *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1313-1315 (*Hutchins*)), but argues this body of case law is wrong and he raises the issue to preserve it for later review. We find *Hutchins*, *supra*, 90 Cal.App.4th at page 1313, is instructive, and we agree with the court's analysis of this issue. The *Hutchins* court determined it was apparent that in enacting section 12022.53, subdivision (d), "the Legislature intended to *mandate* the imposition of substantially increased penalties where one of a number of crimes, including homicide, was committed by the use of a firearm. In so doing, the express language of the statute indicates the Legislature's intent that section 654 *not apply* to suspend or stay execution or imposition of such enhanced penalties." (*Id.* at p. 1313.)

The *Hutchins* court soundly reasoned, "Section 654 is not implicated by the imposition of a sentencing enhancement on a particular manner of committing murder—with the use of a firearm. . . ." (*Hutchins*, *supra*, 90 Cal.App.4th at p. 1313.) Section 654, subdivision (a), provides as follows: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

"The purpose of this statute is to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. Although these distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, the trial court may impose sentence for only one of the separate offenses arising from the single act or

omission—the offense carrying the highest punishment. [Citations.]” (*Hutchins, supra*, 90 Cal.App.4th at p. 1312.)

Here, Hernandez was found guilty of the distinct crimes of second degree murder for killing Cisneros, and first degree murder for killing Tejeda. Discharging a firearm is not an “act” as that term is used in section 654. The allegation Hernandez discharged a firearm is simply the manner in which he committed the two murders. By enacting section 12022.53, subdivision (d), the Legislature determined a defendant “may receive additional punishment for any single crime committed with a firearm[.]” (*Hutchins, supra*, 90 Cal.App.4th at p. 1314.) As the court stated in *Hutchins*, “the Legislature has chosen to enhance or expand the punishment imposed on a single underlying crime, where committed by use of a firearm, in order to deter a particular form of violence judged especially threatening to the social fabric.” (*Ibid.*) We agree with the analysis in *Hutchins* and, therefore, conclude the consecutive 25-years-to-life enhancement was properly imposed.

C. Incorrect Abstract of Judgment

Hernandez claims the abstract of judgment should be corrected to reflect the applicable sentence for count 2. The Attorney General agrees. Count 2 relates to a conviction of first degree murder with special circumstances. At the sentencing hearing, the court sentenced Hernandez to 25 years to life for the underlying crime of first degree murder—count 2. This sentence was enhanced with: (1) two terms of life without the possibility of parole for the special circumstance found true pursuant to section 190.2, subdivisions (a)(3) [multiple murders], and (a)(22) [Hernandez killed victim while he was an active participant in a criminal street gang]; and (2) an additional 25 years to life for the firearm enhancement. (§ 12022.53, subd. (d).) The above sentence is reflected in the abstract of judgment.

However, section 190.2, subdivision (a), provides, “The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in

the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under [s]ection 190.4 to be true” Here, two special circumstances were found to be true, rendering Hernandez subject to a sentence of death or life without the possibility of parole. The court misspoke when it initially indicated it was imposing a 25-years-to-life sentence. But the mistake was later corrected. At the final pronouncement of the total sentence, the court stated the total term for count 2 as “life without parole on count 2, plus 25 years to life, consecutive and not concurrent to the other count.” Accordingly, we direct the superior court to correct the abstract of judgment to reflect the correct total sentence.

D. Five days custody credit?

Hernandez complains he is entitled to five days of additional custody credit. The Attorney General asserts the issue is premature because the record demonstrates Hernandez sent a letter to the trial court requesting a modification of the abstract of judgment to fix this alleged error. The Attorney General argues, without citing any legal authority, we must reject the claim because the trial court has not ruled on the matter.

In his reply brief, Hernandez provides us with authority to address the claim, but concedes the issue is now moot because the trial court has already corrected the custody credit calculations. A new abstract of judgment was filed on March 17, 2008. This court received the clerk’s supplemental transcript containing the amended abstract on June 10, 2008. However, Hernandez claims it was not forwarded to Attorney General or the Department of Corrections and Rehabilitation, Division of Adult Operations. Because we have determined another modification must be made to the abstract of judgment, we order the superior court to make the necessary changes, certify, and send a copy of the amended abstract of judgment to the proper parties.

DISPOSITION

The abstract of judgment shall be modified to reflect a sentence on count 2 of life without parole, plus 25 years to life, consecutive and not concurrent to the other

counts, and the modified abstract shall be forwarded to the Department of Corrections Rehabilitation, Division of Adult Operations. The abstract of judgment shall also reflect the trial court's correction of the custody credits in Hernandez's favor. In all other respects, the judgment is affirmed.

O'LEARY, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.